INAI OFFSHORE & MARINE ENGINEERING SDN BHD A

v.

SRI HUAHENG PACKING SERVICES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24 NCC-49-2010]
31 MAY 2010

COMPANY LAW: *Winding-up - Advertisement of petition - Whether creditor deemed to have notice of winding-up petition once advertised - Whether actual knowledge essential to impose liability on creditor* C

COMPANY LAW: *Winding-up - Priorities - Payment to unsecured creditor before hearing of petition - Whether unsecured creditor could be given preference - Whether creditor had notice of winding-up proceedings - Whether payment validated by court - Whether payment to be refunded* D

The plaintiff was ordered to be wound-up by the High Court on 1 October 2009 pursuant to an order of the court. However, prior to the hearing of the petition, *ie*, during the 'interim period', the directors of the company allowed the remittance of RM1,091,810 from the company's account with Al-Rajhi Bank into the defendant's account. The record disclosed that a total of six creditors had filed their proof of debt. However, the defendant was not one of them and there was no order from the court to validate the payment of the sum it received. Hence the action by the Liquidator of the plaintiff in discharge of his function under s. 233(1) of the Companies Act 1965. E F

Held (allowing prayers (1) and (2)):

(1) An unsecured creditor could not be given preference at the expense of other creditors but instead the liquidator must be allowed to marshall the assets of the company for distribution according to the statutory framework. (para 6) G

(2) A compulsory winding-up proceedings is deemed to commence at the time when the petition is presented. (para 6) H

(3) Actual knowledge of the winding-up proceedings is not a necessary ingredient of liability since a creditor is deemed to have notice of the winding-up petition once it is advertised. On the facts, the transfer was affected after the first two advertisements, and therefore the defendant must be deemed to have implied notice of the winding-up petition. (paras 6-7) I

(4) Any disposal of property of the company made after the commencement of the winding-up by the court is void, unless validated by the court pursuant to s. 223 of the Act. However, the defendant in the present case had not seen it necessary to apply for an order validating the payment. Hence, it was only just and fair that the sum paid to the defendant be refunded to the company. (paras 6 & 16)

Case(s) referred to:
Mosbert Berhad (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***
Re Neath Harbour Smelting and Rolling Works (1887) Times Law Reports, Vol LVI, 727 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 223, 233(1), 277(5), 279, 291, 305(1)

Companies Act 1862 [UK], ss. 153, 165

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol 6, p 412

For the plaintiff - Prakash Letchumanan; M/s Mathews Hun Lachimanan
For the defendant - Kanesrau; M/s Seah Balan Ravi & Co

Reported by S Barathi

JUDGMENT

Mohamad Ariff Yusof J:

[1] This action is filed by the Liquidator of Inai Offshore & Marine Engineering Sdn Bhd (In Liquidation). The plaintiff was ordered to be wound-up by the High Court on 1 October 2009 pursuant to an order of the court in Winding-Up Petition No. D1-28-482-2009. Prior to the hearing of the petition on the aforementioned date, the directors of the company allowed the remittance of RM1,091,810 from the company's account with Al-Rajhi Bank into the defendant's account with Maybank Berhad. The remittance date, according to the record, is 18 August 2009, namely a date before the hearing of the petition.

[2] The liquidator cites, *inter alia*, s. 233(1) by which a liquidator or a provisional liquidator, in the event of a winding-up, has "to take into his custody or under his control all property and things in action to which the company is or appears to be entitled." This action is brought to discharge this broad function. The liquidator takes the position, and validly so, that in discharging his statutory duties he performs an administrative and a quasi-judicial function, and it is part of that quasi-judicial function for him to deliberate on the proof of debt. Creditors (in

particular, unsecured creditors) should submit their proof of debt in the usual way, and any aggrieved creditor will be at liberty to appeal to court and seek a judicial determination. Sections 279 and 291 of the Companies Act are marshalled in support. Further, hand in hand with his statutory duties, the liquidator is expected to exercise a high standard of care and diligence in realizing the company's assets and ascertaining its liabilities, on pain of a personal liability, as recognized in s. 282 of the Act.

[3] The record discloses a total of six creditors have filed their proof of debt for a total sum of RM30,964,260.15.

[4] The defendant company is not one of them, and there is no order obtained from the court to validate the payment of RM1,091,810 received by it. Indeed, there is not even an application pending before this court for this purpose.

[5] At the heart of this suit is the meaning and effect of s. 223:

> **Avoidance of disposition of property, etc.**
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the Court shall unless the Court otherwise orders be void.

[6] After hearing the submissions of the parties, I granted the following orders, and in doing so provided my brief oral grounds:

> Decision:
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> Order in terms of Enclosure 1, Prayer (1), (2). Costs to be paid from assets of the Company. Further Prayer under Prayer (3) that interest be charged at the statutory rate of 8% per annum on sum of RM1,091,810.00 from the date of this Order until full payment.
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> I make no order as to costs since there is no evidence to suggest any complicity between the Directors of the Plaintiff Company and the Defendant in affecting the payment from the Al Rajhi Banking Account.
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> Grounds:
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> It is clear from the authorities:
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> (a) A compulsory Winding-Up proceeding is deemed to commence at the time when the Winding-Up Petition is presented: s. 219(2); *Kredin Sdn Bhd v. D & C Bank* [1995] 3 MLJ 304.

A (b) Any disposal of property of the Company (which includes things in action) made after the commencement of the winding-up by the Court is void, unless validated by the Court (s. 223); *Kimoyama Elektrik (M) Sdn Bhd v. D & C Bank* [1990] 2 CLJ (Rep) 253.

B (c) Monies in a banking account is property *(BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd* [1996] 1 MLJ 872).

(d) An unsecured creditor cannot be given a preference at the expense of other creditors but must instead allow the Liquidator to marshall the assets of the Company for distribution according C to the statutory framework.

(e) Actual knowledge of the winding-up proceedings is not a necessary ingredient of liability, since a Creditor will be deemed to have notice of the Winding-Up Petition once it is advertised. (*Oriental Enterprise Sdn Bhd v. Sri Hartamas Contractors Sdn Bhd D (in Liquidation)* [2002] 4 AMR 3843).

[7] On the facts here, the petition was presented on 29 June 2009 and heard on 1 October 2009, but the payment from the Al Rajhi Bank account was made on 18 August 2009 during the "interim period." The petition was advertised on 13 August 2009, 14 August 2009, 19 August E 2009, 20 August 2009 and 27 August 2009. The transfer was affected after the first two advertisements were done, and therefore the defendant must be deemed to have implied notice of the Winding-Up Petition.

[8] The proposition stated in *Mosbert Berhad (In Liquidation) v. Stella* F *D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 is particularly relevant.

> It cannot be disputed that the primary object of Winding-Up is the collection and distribution of the assets of the company *pari passu* amongst unsecured Creditors after payment of preferential debts. (at p. 447)

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[9] It will therefore be unfair to allow one unsecured creditor to have an undue preference over the others.

[10] I considered the defendant's arguments which are:

H (a) The monies were not paid from the plaintiff's property; and

(b) The plaintiff's directors should be held personally liable, not the defendant.

[11] The first argument rests on the fact that the payment was I remitted from the plaintiff's current account which at that time showed a closing balance of minus RM2,088,026.87. Hence, it is argued the monies are the property of Al Rajhi's Bank, not the plaintiff's. This

however was a payment allowed under a facility granted in favour of the plaintiff, and to that extent it should be regarded as a chose in action belonging to the plaintiff. A

[12] The second argument is premised on the decision of an old Chancery Division case of *Re Neath Harbour Smelting and Rolling Works (1887) Times Law Reports*, Vol LVI, 727. This English case referred to ss. 153 and 165 of the old Companies Act 1862, which have some, though not complete, similarities with the present Malaysian ss. 223 and 277(5) and 305(1). The relevant passage of Chitty, J reads: B

> In a company there is the company and its Directors, and I think I should be frittering away the effect of the 153rd section if I acceded to the argument adduced before me today on behalf of the Respondents, and that the only result of the section is, that the Liquidator is bound to go against the persons who received the money. I do not accept that as the true meaning of this section. I take the section as it stands. Payments that have been made during this interval after the presentation of the Petition are (I shall use words which almost the terms of the act) *prima facie* void. The Company has its officers and its Directors, and they are liable, *prima facie*, for the moneys of the Company which they had misapplied. The language of section 165 is, "where in the course of the Winding Up it appears that any past or present Director has misapplied or become accountable for any moneys of the Company," then he may be proceeded against. So the result is, as the combined effect of the two sections, that the Directors are *prima facie* liable and responsible for the moneys of the Company in respect of avoid payments they have made. ... C D E

[13] As the above passage illustrates, the old English provisions are not completely in *pari materia* with the mentioned Malaysian provisions in our Companies Act. Unlike the old s. 153 of the English Companies Act 1862, s. 223 of the Malaysian Companies Act 1965 is couched in imperative terms with the effect that any disposition of property or chose in action after the commencement of winding-up is void unless otherwise ordered by the court. Although this Chancery Division decision is cited in *Halsbury's Laws of Malaysia*, vol. 6 at p. 412 (this passage being addressed before me by defendant's counsel), it is cited as one of numerous propositions of law within the same page. It is, in my view, to be read in context, and the Chancery Division decision cannot be cited as a firm proposition of law whereby only the Directors of the company can be held liable when improper payments out of the company's assets are made after the commencement of winding-up. The full passage relevant in this connection reads: F G H

> The payment of past debts will not be sanctioned. A Creditor who receives payment between the Petition and the winding order will normally be compelled to refund; and Directors who make improper payments out of the Company's assets are themselves liable to the Company for the moneys paid-up ... I

[14] *Re Neath Harbour Smelting and Rolling Work*s cannot therefore be regarded as an authority for the proposition that the only recourse available to the liquidator is proceedings against the Directors, not the creditor receiving payment after the commencement of winding-up.

[15] It is necessary to emphasise that on the facts of this application the defendant, as recipient of the payment, has not seen it necessary to apply to this court for an order validating the payment. Section 223 of the Act allows the court to validate such payment in a proper case. To quote the pertinent passage in *Halsbury's Laws of Malaysia* at para. 110.227:

> Every disposition of the Company's property, including things connection, and any transfer of shares, or alteration in the status the members of the Company, made after the commencement of the winding-up is void unless the court otherwise orders. In a proper case, the court may order otherwise while the Petition is still pending and before an order has been made on it. In the exercise of its discretion, the court will do its best to ensure that the interests of the unsecured Creditors will not be prejudiced, and will validate transactions entered into in good faith in the ordinary course of trade and completed before the date of the winding-up order ... Where, in the case of the solvent Company, evidence is placed before the court that the Directors considered a particular disposition is necessary or expedient in the interests of the Company, for reasons which the court considers an intelligent and honest person could reasonably hold, the court will sanction the disposition even if the contributory opposes it, unless the contributory adduces compelling evidence proving that the disposition is likely to injure the Company.
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> The court will deal with each case on its own facts in particular circumstances, special regard being had to whether the disposition has reduced assets available in the winding-up, and to the question of the good faith and honest intention of the parties concerned ...

[16] Since no application has been made to validate the payment from the earlier stated banking account to the defendant, it is in my opinion only just and fair that the sum paid to the defendant be refunded to the company with interest calculated from the date of this court's order until full payment.